PUBLIC PROSECUTOR v. LAW SAY SECK & ORS.

[O.Cr.J. (Sharma J.) September 26, 1970]

[Malacca — Criminal Trial No. 15 of 1969]

Criminal Law and Procedure — Admissibility of confession — Confession recorded by magistrate — Accused taken from police custody — Whether confession voluntary — Evidence Ordinance, 1950, s. 24 — Criminal Procedure Code (S.S. Cap. 21), ss. 125(1) and 126(1).

The question raised in this case was the admissibility of statements made by the accused under section 126(1) of the Criminal Procedure Code to a magistrate. The accused were in the custody of the police and were detained under the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969.

Held: in the circumstances of this case there was a doubt as to the voluntary nature of the confession and the statements were therefore not admissible. Where as in this case there was reason to apprehend that the influence of the police was still continuing on the mind of the accused, the confession could have very little weight.

Cases referred to:-

(1) *Hassan Ali & Ors.* v. *King Emperor* A.I.R. 1926 All. 22.

(2) *Baghe Laya & Ors.* v. *Emperor* A.I.R. 1917 Patna 322.

(3) *Dikson Mali & Ors.* v. *Emperor* A.I.R. 1942 Patna 90.

(4) *Reg.* v. *Thompson* [1893] 2 Q.B. 12.

(5) *Emperor* v. *Babulal* I.L.R. 6 All. 509.

(6) *Emperor* v. *Kommoju Brahman* A.I.R. 1940 Patna 163.

(7) *Ibrahim* v. *Emperor* A.I.R. 1914 P.C. 155.

CRIMINAL TRIAL.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the prosecution.

P. Devadas for the defence.

Sharma J.: The first and the second accused made statements under section 126(1) of the Straits Settlements Criminal Procedure Code on 18th July, 1969 and 19th July, 1969 respectively to the magistrate. These statements are in the nature of confessions and at this trial their admissibility has been challenged.

The first accused was at that time 18 years of age and the second accused 19. The first accused was, according to him, arrested on the 28th May, 1969 and kept in detention up to the 16th June 1969. There is, however, some conflict over the exact date of his arrest so far as the prosecution evidence is concerned. P.W. 9 in one of his earlier statements said that the first accused was arrested on the 24th May 1969 and released on the 25th May, 1969, but when the issue of the admissibility of these confessions was tried, he gave the date of the arrest as the 23rd May 1969 and the date of his release as the 24th May 1969 and he stuck on to these dates. However, when he was recalled by the defence yesterday, he admitted that the date given by him earlier, *i.e.* 23rd May, 1969, was a mistake and that the actual date of the arrest of the first accused was the 28th May, 1969. I for one am unable to understand why this uncertainty should come from a police officer about such a vital matter as the date of the arrest of the accused. The matter is a little more regrettable because P.W. 10, the prosecution witness who actually effected the arrest, himself said that the first accused was arrested on the 23rd May, 1969. In the Summary of the Evidence which has been provided to the court the date of arrest given is also the 23rd May 1969. The matter, however, is not relevant to the determination of the issue of admissibility of the confessions except perhaps to the extent as to how much weight or reliance I should place upon the evidence of P.W. 9. It may be a genuine mistake and being human everyone is likely to make mistakes.

The first accused was re-arrested on the 29th June, 1969 and remained in police custody up to the date of making the confessionary statement and even thereafter. The second accused was arrested in the early hours of the morning of 11th July, 1969 and also remained in police custody not only up to the time of his making the confession but for some days thereafter.

Section 126(1) of the Straits Settlements Criminal Procedure Code reads:

"Any police magistrate may record any statement or confession made to him at any time before the commencement of the inquiry or trial."

Section 125(1) of the same Code says:

"No police officer or person in authority shall offer or make or cause to be offered or made any inducement, threat or promise to any person charged with an offence to induce such person to make any statement having reference to the charge against such person."

The wording of this section is almost the same as that of section 24 of the Evidence Ordinance. Thus where a confession is obtained from an accused person by the use of any inducement, threat or promise, such confession becomes inadmissible in evidence and any person causing hurt or wrongfully confining any person for the purpose of extorting any confession or information which may lead to the detection of an offence or misconduct may become guilty of an offence under sections 330 or 331 of the Penal Code. The inducement, threat or promise referred to in section 125 is of the same nature and description as is referred to in section 24 of the Evidence Ordinance. Whether any threat or inducement was offered in any particular case is a question of fact and has to be decided with reference to the circumstances of each case. If it *appears* to the court that the statement was caused by any inducement, threat or promise, it must be clear that such a statement is relevant under section 24 of the Evidence Ordinance. In order that an act or omission may amount to an inducement, threat or promise three things must be satisfied:

(1) One should be able to say that without it the person would not have made a statement. The inducement, threat or promise need not be express but may be implied from the circumstances of the case. If, for example, a person in authority says that the truth has come out and that everyone knows about it and tells the accused that he better say what he knows, this itself may amount to a veiled inducement and threat.

(2) It should be such as would make the person suppose that the advantage to be gained or evil to be avoided would be of a temporal nature.

(3) It should be *sufficient* in the *opinion of the court* to make the accused suppose that he would get the advantage. It is left to the court entirely to form its own opinion as to whether an inducement, threat or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature. In doing so the mind of the person making the statement has to be judged rather than that of the person in authority. In scrutinising a case of this kind the court has to perform a threefold function: It has to determine the sufficiency of inducement, threat or promise; it has to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition mentioned in section 24 of the Evidence Ordinance; lastly it has to judge as a court if the confession appears to have been caused in consequence of any inducement, threat or promise.

Section 126, as I have already quoted refers to the recording of a statement or confession by a magistrate. It must be observed here that our Criminal Procedure Code has no equivalent of section 164(2) of the Indian Criminal Procedure Code, which prescribes the manner of questioning by the magistrate. The act of recording confessions under section 126 is a very solemn act. The magistrate has to satisfy himself that the statement the accused is about to make is not influenced by any form of inducement, threat or promise and there must be a real endeavour on the part of the magistrate to find out the object of the confession. One of the recommended methods to find out if the confession is voluntary is to question the accused as to his motive in making the confession and as to the circumstances under which the question of confession and his willingness to confess first arose. In the case of *Hassan Ali & Others* v. *King Emperor*[1] Boys J. said:

"It would be going much too far to say that a magistrate recording a statement or a confession under section 164 cannot and should not ask a single question of the deponent. But it is equally certain that his position when recording such statement or confession is merely that of a recording magistrate and that he is in no sense inquiring into the case, and that he is in no sense an investigating officer. Such statements and confessions made to a police officer are not regarded as being made in circumstances which justify a court, under ordinary circumstances, in relying upon the record of them, and they cannot be ordinarily put in evidence... A magistrate would be justified in, and ought in the ordinary performance of his duties, to clear up any matter which is ambiguous on the face of the statement but he is wholly unjustified in extracting by questions from the deponent facts which the deponent has not spoken in his court..."

It has been pointed out time and again that the best way of taking down the confession of the accused is to allow him to have his full say without any interference in between except where it may be necessary to understand the purport of what he says. The confessing person should be left to narrate his story as a whole without any interference and allowed to give all the details with the particulars relating to the crime. If this is not done generally the record of the confession loses much of its value. The magistrate's duty is only to record what the accused says or wishes to say. He is in no sense an investigating officer. The questions put by the magistrate must be in pursuance of a real endeavour to find out the object of the confession. It has been held in a number of cases that the effective way of securing freedom of mind to the accused is to send him to jail thus enabling him to have some time to consider whether he really is interested at all in making a confession. He should further be put out of the reach of the investigating officer or officers before he is asked to make the statement. It is not enough for the magistrate to record the confession and say that he was satisfied as to its voluntary nature. The court before which the confession is used must have the material on which it can be satisfied that the confession was in fact voluntary. The duty of the magistrate is to ascertain if there was still some fear operating on the mind of the accused at the time the confession is recorded. It is sufficient if it *appears* to the court that the confession has been somewhat inspired by the inducement threat or promise. It is not necessary that it must be proved definitely that it was so inspired.

In this case it was the investigating officer who took the two accused to the magistrate and it was known and understood throughout not only by the accused but also by the magistrate that the two accused were going back into police custody where in fact they remained for quite some considerable time after the making of the confessions. In fact they were remanded to police custody from time to time till 5th December, 1969. I might take this opportunity to refer to some of the questions suggested by Roe J. in the case of *Baghe Laya & Others* v. *Emperor*[2] and which the magistrates recording the confession should usually ask. The questions suggested are: "Why are you confessing? Are you sorry for your crime or is it that someone has told you that you will gain something by a confession?" It is the duty of the magistrate to refuse to proceed with the recording of the confession until a satisfactory answer to such questions is received.

Again in the case of *Dikson Mali & Anor.* v. *Emperor*[3] Manohar Lall J. said:

"At the outset it must be held that no explanation has been given by the prosecution as to why the accused Ransai Lohara who was arrested by the sub-inspector on 2nd January 1941, was kept by him in custody for more than 24 hours. Further no explanation is offered as to why it took five days to bring the accused before the learned magistrate at Naurangpur. The confessions of the accused were therefore recorded after they had been in the custody of the police for six days and in the presence of an armed police. Again the magistrate did not ask the accused as to why they were making the confession or as to the motive which urged them to make these confessions."

The learned judge then referred to the case of *Regina* v. *Thompson*[4] where Cave J. said:

"I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is a very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; a desire which vanishes as soon as he appears in a court of justice."

Reference in this regard may also be made to *Emperor* v. *Babulal*[5] and *Emperor* v. *Kommoju Brahman*[6] and to the Hong Kong case of *Ibrahim* v. *Emperor*[7] where a great deal of English case law on the point has been discussed and referred to.

Where, as in this case, there is reason to apprehend that the influence of the police was still continuing on the mind of the accused, the confession can have very little weight. One has only to read the two memoranda of enquiry and they do definitely suggest that at least at some stage the two accused had no desire of their own to be produced before the magistrate. It was only the subsequent questioning by the magistrate which can be said to indicate that they were possibly there to make the statements voluntarily. As I have said earlier, one of the duties cast upon me is to put myself in the mind and position of the accused and then ask myself whether in that state they were acting freely and voluntarily. They had remained in police custody even after, according to P.W. 12, the second accused had broken down and the first accused had agreed to tell the truth. They remained at the special branch lock up. Special Branch, to an ordinary man in the street, has quite different connotations from ordinary police. The second accused was brought from the special branch and both the accused knew that they were going back to the police. Added to that was the fact, as I have been told, that their detention at the special branch subsequent to the breaking down of one and the desire of the other to tell the truth was not in connection with this offence but under the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. That alone should have kept the fear in their minds alive, the fear that they had been detained and were going to be kept detained under an Emergency Ordinance. I am not for a moment saying that they should not have been detained or the law does not allow their detention. What I am saying is that if the police wanted to rely upon their confessions, they should have taken every step to remove the lurking shadow of their influence and all the remnants of fear which the accused might still be having in their minds before an attempt was made to have their confessions recorded. Again I am not saying that they should not have been kept in police custody or should not have been subjected to interrogation. It is the duty of the police to procure evidence, to find out the truth and to find out the culprits and to keep the society secure. My only concern at the moment in the determination of this issue is whether in those circumstances I should hold these two confessions as made voluntarily and without any traits of inducement, fear or threat.

I have been told that the use of the word "appears" in section 24 is very significant and the word "proved" has purposely not been used by the legislature. I quite agree. A confession can, of course, be rejected on a valid ground or conjecture but there must be something before the court on which such a valid conjecture can rest. In this case I think there is sufficient evidence on which I can safely base a reasonably well founded belief in the hypothesis of a seeming inducement which avoids the confession under our laws. If the accused is able to point to some circumstances which arouse suspicion the confession cannot be admitted. A mere possibility that the confession was not voluntary is insufficient to warrant its rejection but a probability would suffice to dictate its rejection in evidence.

It may be that there is no justification for me to say that the police investigating agency in our country has not yet acquired a reputation of being proof against the temptation of attempting to secure confessions by questionable methods. I might say that such means and methods are capable of being used and it is the duty of the magistrates to see that they devote their attention to all the safeguards provided for ensuring that the confessions they record are truly voluntary.

The second accused did tell the learned magistrate that it was the inspector who told him that he should relate the matter to the magistrate and if he did so he would be released. He also told the magistrate that he was brought there by the police. In that position and at that stage I think the learned magistrate should not have proceeded further because that should have been sufficient to put him on guard and find that the second accused was not there because of his own choice.

The first accused did in one of his answers say that he was feeling bad in his heart and that, to my mind, does indicate that he was making the statement because of some penitence and I was at one stage inclined to admit his statement and confession. But considering the fact that he said he was assaulted on the 28th May and taken to the hospital where he narrated the story of the assault to the doctor and considering the fact that the police suppressed or almost suppressed the fact of his detention at the Bandar Hilir police station, I have some doubts as to the voluntary nature of his statement as well. Furthermore I am not prepared to believe that it was the two accused who themselves said that they wanted to see a magistrate. I do not think any person in their position could have told any police officer that he wished to go to see a magistrate.

As has been said in so many cases it is idle to expect the accused to lead evidence of any assaults, threats or promises while they remain in police custody. It is, I believe, virtually impossible for any person of an average understanding to pick up the courage and take the risk of lodging a report in the police station against a police officer or make a complaint against one police officer to another police officer while in such custody. The police no doubt are an aspect of the State's ability to maintain law and order and in that sense a symbol of service. Yet the police also represent the force and the might of the State. Similarly a magistrate is a symbol of justice and equality. He is also in a sense a symbol of the majesty and awe of the law and any ordinary person appearing before a magistrate has in him some inherent fear, more particularly so when he comes from police custody. Considering the age of the two accused and the other circumstances to which I have already referred, I may say that while I am quite prepared to believe P.W. 9, P.W. 12 & P.W. 15, I cannot say that I do not believe the two accused. I am not entitled to take that atti-

tude merely because they appear as accused before me. They have given evidence on oath. The position thus is that I am unable to say that I disbelieve the accused and my mind is not free from doubt as to the voluntary nature of the confessions. In the result I hold that Exhibits P11 and P14 are not admissible and they will not be read, heard or used at the hearing of this trial.

Confessions rejected.

Solicitors: *Devadas & Co.*

RE BADRI BIN ABAS

[R. Cr. J. (Sharma J.] October 27, 1970)

Criminal Law and Procedure — Sentence — Binding over — Whether discretion exercised — Criminal Procedure Code (Cap. 6), s. 173A.

In this case the accused pleaded guilty to an offence under section 448 of the Penal Code and the learned magistrate convicted him and bound him over under section 173A of the Criminal Procedure Code.

Held: the discretion of the court to act under section 173A of the Criminal Procedure Code could only be exercised according to the circumstances of the case. There was no evidence to show that by reason of the character, antecedents and the circumstances under which the accused committed the offence, it was expedient to act under the section in this case and therefore the order of the learned magistrate must be set aside.

Case referred to:-

(1) *Public Prosecutor* v. *Idris* [1955] M.L.J. 234.

CRIMINAL REVISION

Ahmad Fairuz bin Dato Sheikh Abdul Halim (Deputy Public Prosecutor) for the Public Prosecutor.

T. Thalayasingam for the accused.

Sharma J. (delivering oral judgment): The accused in this case was charged under section 448 of the Penal Code. He pleaded guilty but the learned magistrate bound him over under section 173A of the Criminal Procedure Code and yet recorded a conviction. I called for the records in revision as I thought it was not a proper exercise of discretion by the learned magistrate under section 173A of the Criminal Procedure Code.

Section 173A(ii) of the Criminal Procedure Code reads as follows:

"When any person is charged before the court with an offence punishable by such court, and the court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to record a conviction, make an order either —

(a) dismissing the charge or complaint after such admonition or caution to the offender as to the court seems fit; or

(b) discharging the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for the sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order."

There is a clear distinction between section 173A and section 294 of the Criminal Procedure Code and that was very clearly pointed out by Thomson J. (as he then was) in the case of *Public Prosecutor* v. *Idris*[1] where he said:

"The case in itself was of no importance but for the benefit of magistrates I feel I should make a few observations on the subject of sections 173A and 294 of the Criminal Procedure Code.

There is a certain amount of overlapping between the two sections in the sense that very often a case may be appropriately dealt with under either of them. There are, however, certain differences which must be carefully observed.

Section 173A is applicable in all cases triable in the magistrate's court irrespective of the nature of the prescribed punishment and it is to be observed that where it is proposed to exercise the powers given by it the court should not proceed to conviction.

Section 294 on the other hand, which only applies in the case of adult offenders, can only be made use of where a person has been convicted and where his conviction is for an offence punishable with imprisonment without the option of a fine.

I do not wish to lay down any hard and fast rule, which in any event would be difficult to prove, but magistrates would be well-advised only to make use of section 294 where an offence which is generally of a serious nature and which is punishable with imprisonment has been committed by an adult offender (*i.e.* an offender of 16 years or over) and where it is considered desirable to place him on probation.

All other cases which are thought to call for unusually lenient treatment can be more appropriately dealt with under the provisions of section 173A. In this connection, however, it is to be observed that generally speaking where an offence has been committed it calls for punishment and that in the case of the numerous statutory offences punishable by a fine the appropriate way of dealing with cases that are not in themselves very serious is the imposition of a fine adjusted in amount according to the view taken of the seriousness of the offence."

The object of punishment as has been so often said, is two-fold, first the prevention of offences and secondly the reformation of the offender. Punishment would become a greater evil if, instead of reforming the offender, it is likely to harden him by repeating the crime and thus causing possibly an irreparable injury not only to himself but also tending to defeat the object of punishment. Section 173A, I think, is primarily aimed at dealing leniently with first offenders who are not guilty of offences which are not so serious by giving such persons a chance of reformation which they would lose if they were sent to prison. A person convicted of an offence cannot, however, as of right claim the benefit of section 173A. The exercise of the power is entirely in the discretion of the court and can only be exercised according to the circumstances of each case. The legislature has very clearly enumerated that the age, character, antecedents of the offender, the circumstances in which the offence was committed, the physical or mental condition of the offender, the trivial nature of the offence if it be so, or other extenuating circumstances under which the offence was committed should be taken into consideration while exercising the discretion under this section. An exercise of discretion under this section requires a considerable sense of